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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM and C. A. JARVIS,

Petitioners,

v.

DANIEL MORGAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the court of appeals (A. 66-70) is reported at 383 F.2d 139. The opinions of the district court (A. 40-41, 51-61) are not reported.

Jurisdiction

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on March 11, 1968. On June 10, 1968, Mr. Justice White

extended the time for filing a petition for a writ of certiorari to and including June 24, 1968 (A. 71). The Petition was filed on that date and was granted on December 9, 1968 (A. 72). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

Questions Presented

1. Whether the court of appeals erred in remanding this case to the district court for a factual determination to establish whether the alleged acts of petitioners were in fact committed under "color of office": (A) on the grounds of the adequacy of the record to support this claim of "color of office"; or (B) on the ground that its decision to remand is not dependent upon its holding that the test for "color of office" is narrower than the standard for "official immunity" of federal officials.

2. Whether, on the bases of the record here and of the nature of the opinion of the court of appeals, it would be more appropriate for this Court to abstain from a decision on the relationship between the scope of the immunity doctrine and that of the removal power respectively.

Statutes Involved

28 U.S.C. §1442 provides, in pertinent part:

> Federal officers sued or prosecuted.
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the

United States for the district and division wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties * * *.

And 28 U.S.C. §1446 provides, in pertinent part:

Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

Statement

Respondent adopts, in general, the statement of the case as presented by petitioners' brief (Br. 3-7), with, however, the following additional facts revealed by the record.

While the case was still pending in the Kansas court, respondent served upon petitioner Willingham lengthy "in-

terrogatories" (A. 19-20). After removal to the United States District Court, he filed therein a "Verified Motion for Order Compelling Answers to Interrogatories" (A. 33-37). Several of these interrogatories would appear to be directly relevant to the question whether petitioners were acting under "color of office" at the time of the alleged acts by petitioners, particularly No. 14 (A. 19), No. 32 (A. 22), Nos. 51, 53 and 54 (A. 26-27). The court of appeals noted in its opinion (A. 70):

> It may be that the answers to some of appellant's interrogations would provide a factual basis for the determination of the removal question. We note that these interrogations were not answered nor do we find that appellees were excused from answering them.

Summary of Argument

The court of appeals, in a case of first impression, held that the "color of office" test for removal is "much narrower" than the standard for determining a federal officer's immunity from suit, and that the case should be remanded to the district court for a factual determination whether federal prison officials were acting under color of office in allegedly committing torts against a prisoner.

The right of removal is completely statutory, and all statutory requirements must be complied with. 28 U.S.C. §1446(a) requires that the removal petition be supported by a short, plain statement of facts. Averments that the officer was acting under color of office are conclusionary in nature and are insufficient jurisdictional basis for the district court in removal proceedings. This Court has required a candid and specific averment of facts from which the court

may conclude that the officer was acting under color of law. This requirement goes to the jurisdiction of the court, which cannot be waived and may be raised at any time.

The record in this case reveals only one single uncontroverted fact—that the only contact which the prison officials had with the prisoner was within the walls of the prison. An affidavit contained a recital of their duties, but no effort was made to supply facts as to the circumstances of the incidents or to show how they may have been related to the duties of the officer. The court of appeals was correct in holding that the record was insufficient to support the jurisdiction of the district court and in remanding to that court for a factual determination on the removal question.

The holding of the court of appeals on the comparative scope of the "color of office" test and the immunity standard was unnecessary to the court's disposition of the case, which must be remanded for a factual determination of the removal question in any event. Respondent is ready to concede that the court's holding in this regard was erroneous because unsupported by either sound reason or authority. The only reason advanced by the court was that the removal power, being of statutory origin, is to be more narrowly interpreted than the standard for judicially-created immunity. The authorities cited stand for the proposition that in the automobile accident cases, the right to removal may not be present and is therefore narrower than the concept of the "scope and course of employment." They do not support the proposition that the "color of office" test is narrower than the immunity standard.

Finally, the record in this case is not fully enough developed to serve as the basis for this Court's decision on

the merits. It would be more appropriate to have a factual determination in the district court on the removal issue, so as to provide a more adequate record for review of the legal issues by this Court.

ARGUMENT

I.

The Court of Appeals Did Not Err in Remanding This Case to the District Court for a Factual Determination to Establish Whether the Alleged Acts Were in Fact Committed Under "Color of Office," as Required by the Removal Statute, 28 U.S.C. §1442(a)(1).

A. The record in this case is clearly inadequate, under the requirements of 28 U.S.C. §1446(a) and prior decisions of this Court, to sustain federal jurisdiction under the removal statute.

1. This Court has held that, in regard to all courts of the United States inferior to the Supreme Court, "two things are necessary to create jurisdiction, . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it." *Mayor* v. *Cooper*, 6 Wall. 247. The first condition, the constitutionality of a predecessor to 28 U.S.C. §1442(a) was sustained by the Court in *Tennessee* v. *Davis*, 100 U.S. 257, because of the important interest of the federal government in protecting its officials, and thereby its own operations, from vexatious litigation—criminal or civil—in potentially hostile or unfriendly state tribunals. The constitutionality of 28 U.S.C. §1442(a) is not here in question, to the extent that

Congress wishes to exercise its constitutional power to create a right of removal for federal officers prosecuted or sued in state courts.[1]

The right to remove a cause from a state court to a federal court is, however, not derived from the Constitution but is entirely statutory, and in any removal case the first question to be answered is whether all the requirements of the statute have been met. *In re Heisig*, 178 F.Supp. 270, 273 (N.D. Ill.). The present statute, 28 U.S.C. §1442(a), does not give a federal officer the right to remove a case against him from a state to a federal court simply on the ground that he is a federal officer, but he must come within the ambit of the statutory provisions. *Michigan* v. *Banning*, 88 F.Supp. 449 (E.D. Mich.). The categories of federal officials upon whom Congress has conferred this right, as well as the conditions under which they may exercise it, are limited by the terms of the statute. Although "such measures are to be liberally construed to give full effect to the purposes for which they were enacted," *Colorado* v. *Symes*, 286 U.S. 510, the right of removal and the jurisdiction of the federal court to which removal is sought cannot go beyond the limits prescribed in the statute itself.

The removal statute here in question, 28 U.S.C. §1442 (a)(1), under which the right of removal is here claimed, gives such right to federal officers only if the acts forming the basis of the state action against them were done under "color of office." Their claim that the acts fall within this

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[1] In *Maryland* v. *Soper* (No. 2), 270 U.S. 36, 44, the Court refused to discuss the extent to which Congress might enlarge the basis for a claim of the right to remove. An attempt by Congress to extend the right to all federal officials, whether or not the action or prosecution in the state court had any relation to their federal office or duties, might raise serious constitutional questions.

category must be substantiated, and 28 U.S.C. §1446(a) requires that they file in the district court "a verified petition containing a short and plain statement of the facts which entitle him or them to removal" together with a copy of the proceedings in the state court. Since the requirements of §1446(a) apply to various situations in which the removal power may be exercised, e.g., in diversity of citizenship cases,[3] in cases involving federal officials,[4] military personnel,[5] civil rights cases,[6] it follows that the "short and plain statement of the facts" giving rise to the right of removal may need to be more elaborate under some circumstances and less so in others.

In construing the requirement that the record contain a statement of facts showing the basis for the claim to the right of removal, this Court has been quite explicit. In *Maryland* v. *Soper* (No. 1), 270 U.S. 9, the Court granted the State's petition for a writ of mandamus directing the remand of the case to the state court, on the ground that this requirement had not been met. In that case, federal prohibition officers in the performance of their statutory duties had just destroyed an illegal still in a wooded area and were returning to their car to return to their office in order to make an official report of the incident. On the way to the car they found a man lying in the woods who had been shot. They took him to a doctor for treatment, but he died. They then reported the incident to the state officials and were subsequently indicted by the state for his murder.

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[3] 28 U.S.C. §1441.

[4] 28 U.S.C. §1442(a).

[5] 28 U.S.C. §1442a.

[6] 28 U.S.C. §1443.

All of these facts were set forth in great detail in their petition for removal. This Court nonetheless held the statement of facts in their affidavit to be insufficient to confer jurisdiction upon the federal court under the removal statute. The Court's opinion, *Id.*, at 33-35, is worth quoting at some length:

> . . . There must be a causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his, not justified by his federal duty. But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution
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> • • • • •
>
> We think that the averments of the amended petition in this case are not sufficiently informing and specific to make a case for removal under section 33. We have set forth the account the defendants gave in their amended petition of what they saw and did, but the only averments important in directly connecting the prosecution with their acts are at the opening and close of their petition. . . .
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> • • • • •

> These averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties. They do not negative the possibility that they were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty. . . . It is true that in their narration of the facts, their nearness to the place of Wenger's killing and their effort to arrest the persons about to engage in alleged distilling are circumstances possibly suggesting the reason and occasion for the criminal charge and the prosecution against them. But they should do more than this order to satisfy the statute. In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer. . . .

And in the latter case of *Colorado* v. *Symes*, 286 U.S. 510, the Court while saying that the statute should be interpreted liberally enough to effectuate its purpose, *Id.*, at 517, nonetheless followed the lead of *Maryland* v. *Soper, supra*, denied the right of removal on the same grounds, saying, *Id.* at 518-519:

> . . . The burden is upon him who claims the removal plainly to set forth by petition made, signed and unequivocally verified by himself all the facts relating to the occurrence, as he claims them to be, on which the accusation is based. Without such disclosure the

> court cannot determine whether he is entitled to the immunity. No question of guilt or innocence arises and no determination of fact is required but it must fairly appear from the showing made that petitioner's claim is not without foundation and is made in good faith.

While both *Soper* and *Symes* involved criminal prosecutions, this fact is immaterial, since §1442(a)(1) and §1442(a) apply equally to the removal of both criminal and civil cases, *Goldfarb* v. *Muller*, 181 F.Supp. 41, 47 (D.N.J.), and with the sole exception of *Allman* v. *Hanley*, 302 F.2d 559, 562 (C.A.5), every lower federal court which has considered the question has held that mere averment that the acts alleged were done under "color of office" is insufficient to establish federal jurisdiction in the absence of a factual basis for such a *conclusion*.[6] *See, e.g., Ampey* v. *Thornton*, 65 F.Supp. 216 (D.Minn.); *In re Heisig*, 178 F.Supp. 270 (N.D.Ill.); *Brenner* v. *Kelley*, 201 F.Supp. 871 (D.Minn.); *Tennessee* v. *Keenan*, 13 F.Supp. 784 (W.D. Tenn.); *Logemann* v. *Stock*, 81 F.Supp. 337 (D.Neb.) (holding that the lack of specific factual basis in the removal petition was not fatal, since such basis was disclosed by the attached original complaint).[7] The question was summed up succinctly and accurately in *Michigan* v. *Banning*, 88 F.Supp. 449 (E.D. Mich.), as follows:

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[6] The same requirement has been expressed even in cases in which the court found it had been met. See, e.g., *DeBusk* v. *Harvin*, 212 F.2d 143 (C.A. 5); *Poss* v. *Liebermann*, 299 F.2d 358 (C.A. 8), certiorari denied, 370 U.S. 944; *Meredith* v. *Van Oosterhout*, 286 F.2d 216, certiorari denied, 365 U.S. 835; *Colorado* v. *Maxwell*, 125 F.Supp. 18 (D. Colo.); *Horne* v. *Aderhold*, 1 F.Supp. 690 (N.D. Ga.).

[7] Cf. *Meredith* v. *Van Oosterhout*, 286 F.2d 216, certiorari denied, 365 U.S. 835.

> It appears to this court that defendants labor under the impression that since admittedly they are federal employees all they must do is to so state and to add to their petitions for removal that all acts done by them were done under color of office; that then the case is automatically removed to this court.
>
> This was not true under the old law, . . . and it is not true under the present law, §1442 of Title 28, U.S.C.A. . . . application of the law is still limited to those acts done by these employees "under color of such office." Furthermore, this fact must affirmatively appear, not alone by a broad statement in the petition to that effect, but by direct averments which must exclude possibility that any of their alleged acts was not justified by their federal duty. . . .

The requirement is jurisdictional, it cannot be waived, the jurisdictional facts must affirmatively appear, and the question may be raised at any time.[8] *Gainesville* v. *Brown-Crummer Co.*, 277 U.S. 54 (a diversity case). The statute, 28 U.S.C. §1447(c), directs the court to remand the case if at any time during the trial it appears that removal was improvidently granted; and in *Naas* v. *Mitchell*, 233 F. Supp. 414 (D.Md.), the court raised the question *sua sponte* and decided there was no right to removal under §1442 (a)(1).

2. The court of appeals, in a single sentence in the last paragraph of its opinion, held that the record in this case fails to establish that the alleged acts were committed under

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[8] This renders immaterial the fact, pointed out by petitioners (Br. 10, note 5), that it was only on their petition for rehearing that petitioners dealt with the removal issue.

"color of office" (A. 70). Although the court in so holding did not refer to the requirement of §1446(a) nor to the precedents cited above, it is submitted that even a casual analysis of the record in this case will reveal that it is almost completely devoid of a factual basis for such a conclusion.[9]

As was noted by the court in its opinion (A. 69), the only undisputed evidence in the record was that the only contact the petitioners had with the respondent occurred within the walls of Leavenworth Penitentiary. And even this statement appears for the first time, not in the petition for removal (A. 6-10), but in petitioners' affidavits in support of their motion for summary judgment (A. 44-46, 47-49). The averment in the petition for removal that petitioners were, in reference to any of the alleged acts upon respondent, acting under color of office and within the scope of their authority (A. 9) and the averments to substantially the same effect in the affidavits in support of the motion for summary judgment (A. 46, 48) were completely conclusionary in nature.[10] As such they did not fulfill the requirements of §1446(a) nor the tests laid down by this Court in *Maryland* v. *Soper, supra,* and in *Colorado* v. *Symes, supra.* They were inadmissible in evidence under

[9] As petitioners correctly pointed out (Br. 10, note 5), 28 U.S.C. §1442(a)(3) could have been relied upon as the basis for removal, since as penal officers they are also officers of the court. See *Brann* v. *McBurnett,* 29 F.Supp. 188 (E.D. Ark.); *Jones* v. *McGill,* 46 F.2d 334 (D. N.H.); *Horne* v. *Aderhold,* 1 F.Supp. 690 (N.D. Ga.). That provision allows officers of the courts the right of removal if the act was done "under color of office or in the performance of his duties." However, the lack of a factual basis in the record to support the claim of "color of office" is equally fatal to the claim that such acts were done "in the performance of his duties."

[10] See *Potts* v. *Elliott,* 61 F.Supp. 378 (E.D. Ky.).

F.R.Civ.P. 56(e) and were in the nature of conclusions of law to be drawn by the court upon the basis of factual evidence, *Stone* v. *Phillips*, 245 F.Supp. 247 (D. Colo.). The affidavits in support of the motion for summary judgment (A. 44-46, 47-49) set forth in detail a description of the official duties of each of the petitioners. It is significant, however, that neither petitioner refers therein to the incidents forming the basis of respondent's original claim nor makes the slightest effort to give the court even a faint indication as to how or why these incidents qualified as acts done under "color of office" or even "in the performance of his duties." This certainly does not satisfy the burden of submitting a "candid, specific and positive statement of the facts so that the court will be able to determine the validity of his claim for removal." *Colorado* v. *Symes*, *supra*, at 520. It is true that respondent's statement in his verified motion to remand (A. 30-33), to the effect that petitioners were not acting in the performance of their official duties, was also conclusionary in nature,[10] as were the more detailed but similar averments in his verified opposition to the motion for summary judgment (A. 48-51).[11] Petitioners' conclusionary statement that they were acting under color of office was, as the court of appeals noted (A. 69-70), countered by respondent's equally conclusionary statement that they were not so acting. It is clear, at least, that the failure of petitioners to afford a factual basis for the court to draw such a conclusion cannot, therefore, be remedied by any allegations of respondent in the record.[12]

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[11] See *Preble* v. *Johnson*, 275 F.2d 275 (C.A. 10).

[12] Cf. *Logemann* v. *Stock*, 81 F.Supp. 337 (D. Neb.); *Meredith* v. *Van Oosterhout*, 286 F.2d 216 (C.A. 8), certiorari denied, 365 U.S. 835.

It is established, moreover, that the burden is upon him who claims the removal to set forth the factual basis supporting such claim, *Colorado* v. *Symes, supra,* and, if they are challenged, he has the burden of proof. See *Tennessee* v. *Keenan,* 13 F.Supp. 784 (W.D. Tenn.), which discusses extensively the relative burdens of defendant and plaintiff in removal cases.

Further, several of respondent's interrogatories—specifically, No. 14 (A. 19), No. 32 (A. 22), and Nos. 51, 53-54 (A. 26-27)—seem to imply that petitioner Willingham may *not* have been acting as warden at the time of the alleged incidents and may thus raise a question as to whether the alleged acts were "under color of office"; and the court of appeals noted (A. 70) that answers to some of these interrogations might have provided the needed factual basis for the determination of the removal question.[13] In any event it is clear that the petitioners did not bear the burden placed on him who seeks removal, that the record as a whole does indeed fail to establish that the alleged acts were committed under "color of office," and that the removal petition was jurisdictionally defective.

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[13] It is true, as petitioners comment (Br. 27, note 17), that the main thrust of respondent's interrogations as addressed to Willingham was to ascertain the identity of the "Doe" and "Roe" defendants (A. 30-32). However, the few interrogatories mentioned above as part of the record do deal specifically with the question whether or not he was warden or acting warden during the time of the alleged torts, as was pointed out in respondent's opposition to the grant of certiorari (Resp., p. 5). Further, while the failure of Willingham to reply may bolster the case against him, the affidavit of petitioner Jarvis remains jurisdictionally defective because the record fails to establish a factual basis for the removal claim as to both petitioners.

3. The court of appeals remanded the case to the district court for a factual determination whether the alleged acts were committed under "color of office"; and if the evidence did not support this conclusion, then the district court was to remand the case to the state court (A. 70). It is submitted that the court did not err in so doing. It is true that the court's judgment reversing and remanding to the district court was accompanied by a holding, which may ultimately be found to be erroneous, on the interrelationship of the removal power and the immunity doctrine, with which most of the opinion is taken up. It is enough that its judgment is supported by the express finding that the record fails to establish that the acts alleged were committed under "color of office" (A. 70).

Indeed, the action by the court of appeals here presents a very close analogy to the procedure followed by this Court in *Maryland* v. *Soper* (No. 1), 270 U.S. 9, 35-36, and also in *Colorado* v. *Symes*, 286 U.S. 510, 521. In both cases, this Court held that the district judge should have granted the State's motion to remand the case to the state court. In both cases, however, the Court allowed the trial judge, in his discretion, to permit the defendants to amend their petitions for removal in order to establish, if they could, a factual basis for the claim of removal. If the district judge did not so permit, or if the evidence failed to establish such basis, then it became mandatory that the case be remanded to the state court.

This is not to say that the disposal of this case by the court of appeals was the only course open to it. Upon the record in this case, the court of appeals could have simply reversed the district court on its refusal to remand, held the summary judgment proceedings as being *coram non*

judice, and directed the district court to remand the case to the state court of Kansas. What the court of appeals did, in effect, is what this Court did in *Soper* and in *Symes*—that is, it granted a *locus poenitentiae* by permitting the defendants to establish a factual basis, if possible, for their claim of removability. To put it more colloquially, it gave them the chance of another bite at the same apple.

Nor is this action of the court of appeals to be disapproved on the ground that it is necessarily prejudicial to petitioners here or to others in the future. The fear of the Government, of course, arises from the fact that an order of the district court remanding a case to the state court is not reviewable under 28 U.S.C. §1447(d).[14] The effect would be to leave as the law of the Tenth Circuit the opinion of the court of appeals on the interrelation between the scope of the removal power and that of the immunity of federal officials under *Barr* v. *Matteo*—at least until such time as another case might arise on this issue in another Circuit. This result, should the Court deem proper, may be precluded by the framing of an appropriate judgment or mandate by this Court.[15]

Petitioners are in error in interpreting the judgment of the court of appeals to require an "extensive factual hear-

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[14] This Court may, however, review the judgment of the court of appeals requiring such remand to the state court by the district court. See *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464.

[15] Several possibilities suggest themselves. The Court might disapprove the views expressed in the opinion of the court of appeals and remand for a determination by the district court on the removal question. Or the Court, without expressing any opinion on the views of the court of appeals, might remand to that court with directions to retain jurisdiction while the factual determination is made in the district court, so as to avoid the impact of 28 U.S.C. §1447(d).

ing" on the question of removability (Br. 20) or to be likely to result in "extensive litigation about the threshold issue of removal" (Br. 23). The court of appeals did not require a *hearing*, either extensive or otherwise. It merely required the district court to make a factual *determination* whether there was any basis for the claim of removability under the statute, 28 U.S.C. §1442(a)(1). It would also permit petitioners to amend their petition in order to invoke removal under §1442(a)(3). No hearing should ordinarily be necessary; the factual determination may, of course, be made by the court on the basis of affidavits of petitioners, in which it should be relatively simple to give a plain, short statement of the facts of the alleged incidents and to indicate—if this is not already apparent—their causal relationship to the authority which they exercise under "color of office." See *Horne* v. *Aderhold*, 1 F.Supp. 690 (N.D. Ga.), holding sufficient removal petition of prison warden, sued for false imprisonment, which stated simply that he was the warden and had done nothing in the premises except to receive the plaintiff under due commitment by the court. Presumably a hearing would be necessary only where there is a genuine controversy as to the facts themselves. Cf. *Tennessee* v. *Keenan*: the burden of proof is on him who claims removal, but the burden of going forward with the evidence is on the other.

B. THE COURT OF APPEALS DID NOT ERR IN REMANDING THIS CASE TO THE DISTRICT COURT FOR A FACTUAL DETERMINATION TO ESTABLISH WHETHER THE ALLEGED ACTS OF PETITIONERS WERE IN FACT COMMITTED UNDER "COLOR OF OFFICE," ALTHOUGH IT MAY HAVE ERRED IN HOLDING THAT THE "COLOR OF OFFICE" TEST IS MUCH NARROWER THAN THE STANDARD FOR DETERMINING OFFICIAL IMMUNITY UNDER *Barr* v. *Matteo*, 360 U.S. 564.[16]

1. Heretofore no federal court, perhaps wisely, has attempted to define the precise interrelationship between the removal power and the doctrine of official immunity. The two concepts are obviously interrelated, and in many cases both will be applicable. They are, however, not merely different concepts, but concepts of a completely different order or category. They differ in their origin and historical development, in the purpose which they serve, in the test which determines the applicability of either concept or both in a particular case, and finally, in their effect. It may be helpful to compare them briefly.

Immunity

The concept of official immunity is largely of judicial making, *Barr* v. *Matteo*, 360 U.S. 564, 569. Legislative and

[16] Counsel for respondent has found this a most difficult question to brief, largely because of the lack of facts in the record and the inconclusive nature of the opinion of the court of appeals. Respondent, while not agreeing fully with all the views advanced in petitioners' brief, is ready to concede that the court of appeals may have erred in holding that the "color of office" test is "much narrower" than the standard for official immunity, since the holding seems to be unsupported by either reason or authority. At the same time, for the reasons already advanced, respondent continues to urge that—no matter what the respective tests—the record is inadequate to support federal jurisdiction under the applicable removal statute. The discussion which follows is intended to explain respondent's position in this regard.

judicial immunity are deep-rooted in the common law, and the former is secured constitutionally.[17] The immunity of executive officials would seem to have appeared fairly recently, in the 1896 case of *Spalding* v. *Vilas*, 161 U.S. 483, holding an absolute privilege for the Postmaster General. A similar absolute immunity was found for a Special Assistant Attorney General, as at least a quasi-judicial officer, in *Yaselli* v. *Goff*, 12 F.2d 396 (C.A. 2), affirmed *per curiam*, 275 U.S. 503. The opinion of the court of appeals held, in a suit for malicious prosecution, at p. 406, that:

> . . . The immunity is absolute and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions. . . .

And Judge Learned Hand, in *Gregoire* v. *Biddle*, 177 F.2d 579 (C.A. 2), at p. 581, stated the test to be used:

> . . . There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer has been found in a balance between the evils inevitable in either alternative. . . .
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> The decisions have, indeed, always posed as a limitation upon the immunity that the official's acts must have

[17] U.S. Const., Art. I, §6. A brief historical summary is given by Chief Justice Warren, dissenting in *Barr* v. *Matteo*, 360 U.S. 564, 578, at 579.

> been within the scope of his powers; . . . What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .

This was quoted with approval in *Barr* v. *Matteo,* 360 U.S. 564, at 571, in a case involving a libel suit for alleged defamation in a press release issued by the acting director of a federal agency, giving the reason why he had suspended the plaintiffs. The Court held, at p. 575:

> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, . . .

This "outer perimeter" concept received further elaboration in *Norton* v. *McShane,* 332 F.2d 855 (C.A. 5), at p. 859:

> . . . The requirements that the act be within the outer perimeter of the line of duty is no doubt another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision, and not be manifestly or palpably beyond his authority. . . .
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> There is another limiting factor—the nature of the duties. It is often said that the officer must be performing a "discretionary function". . . .

The Fifth Circuit opinion then quotes with approval from the opinion of Judge Medina on the meaning of "discre-

tionary functions", *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 659, certiorari denied, 374 U.S. 827:

> There is no litmus paper test to distinguish acts of discretion . . . , and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?

The sole effect of the immunity doctrine is to give the official a federal defense to a suit against him, no matter what the forum, *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652:

> When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. . . . Federal law, however, supplies the defense, if the act was done pursuant to a federally imposed duty . . . of immunity from suit . . . .

The burden of proof rests upon the plaintiff. See *Norton* v. *McShane*, *Id.* at 861:

> In the face of the Attorney General's affidavit, the plaintiffs cannot rest upon the mere allegations of their complaints unsupported by sworn testimony. It became incumbent on the plaintiffs, by affidavits or otherwise as provided in Rule 56, supra, to set forth specific facts showing that there was a genuine issue for trial as to whether the defendants were acting within the line and scope of their official duties. . . . The plaintiffs introduced no evidence whatever, and

thus failed completely to meet the burden resting upon them.

Removal

The removal power, on the other hand, is completely of statutory origin, and the statutory requirement must be met. *In re Heisig,* 178 F.Supp. 270, 273 (N.D. Ill.). For various classes of federal officers or employees, Congress created different tests for the power of removal. The court noted, in *Naas* v. *Mitchell,* 233 F.Supp. 414, 419 (D. Md.):

> Congress in this field of removal statutes knew what it meant and knew how to state what it meant. When the test of the propriety of removal was an act done "under color of . . . office" or on account of "any right, title or authority" claimed under a law of the United States it was so expressly stated. . . . When the test was an act done by any officer of the courts of the United States "under color of office *or in the performance of his duties,*" it was so stated . . . , and when the basis for removal in cases of suits against government employees for damage resulting from the operation of a motor vehicle was to be predicated merely upon the fact the employee was acting within the scope of his office or employment Congress [so] provided. . . .

The effect of the removal statutes is not to provide immunity from suit or prosecution, but solely to give to the official defendant a federal forum in which to have the case litigated. The purpose of the statutes is to protect federal officials from vexatious and prolonged litigation in potentially hostile or unfriendly local tribunals, thereby running the risk of paralyzing the operations of the national govern-

ment. See *Tennessee* v. *Davis*, 100 U.S. 257, 263, quoted at length by petitioners (Br. 16).

The burden of establishing by evidentiary averments that he comes within the statutory scheme is upon him who seeks removal, *Maryland* v. *Soper* (No. 1), 270 U.S. 9, 33-35, *Colorado* v. *Symes*, 286 U.S. 510, 518-519. The test is that there must be a causal connection between what the officer has done under asserted official authority and the state prosecution or suit. *Maryland* v. *Soper*, *supra*, at 33.

2. Against this background of the statutory and case law of the removal power and the immunity doctrine, the court of appeals approached the task of determining whether the "color of office" test was broader or narrower than the "official immunity" standard—and undertaking which, it is submitted is unreal and also unnecessary to the disposition of the case before it. Impressed by the fact that the immunity doctrine is of judicial origin, while the removal power is statutory in nature, the court felt that the latter should be much more narrowly interpreted than official immunity. In support of this proposition, the court of appeals cited a long list of cases which it construed to hold that the "color of office" test provides a rather limited basis for removal. All of these cases, with one exception, involve automobile accidents while government employees were driving a car "in the scope and course of their employment," and held that establishing such scope and course of employment was not sufficient to establish a right of removal: *Ohio* v. *Dorko*, 247 F.Supp. 866 (N.D. Ohio); *Naas* v. *Mitchell*, 233 F.Supp. 414 (D. Md.); *Galbert* v. *Shivley*, 186 F.Supp. 150 (W.D. Ark.); *Ebersole* v. *Helm*, 185 F.Supp. 277 (E.D. Pa.); *Goldfarb* v. *Muller*, 181 F.Supp. 41 (D.

N.J.); *Fink* v. *Gerrish,* 149 F.Supp. 915 (S.D.N.Y.); *Oklahoma* v. *Willingham,* 143 F.Supp. 445 (E.D. Okla.). A few cases are *contra*: *Pepper* v. *Sherrill,* 181 F.Supp. 40 (E.D. Tenn.); *Norfolk* v. *McFarland,* 143 F.Supp. 587 (E.D. Va.). The court seems to have misunderstood the case of *Brenner* v. *Kelly,* 201 F.Supp. 871 (D. Minn.), which drew a distinction between negligent acts and those performed in the course of duty—a distinction which would effectively eliminate both the removal power and the immunity doctrine in such cases. The court then proceeds to conclude (A. 69) that, while the sole evidentiary fact in the record—that the only contact between petitioners and respondents was within the confines of Leavenworth Penitentiary—although it might sustain a finding of immunity, it was insufficient ground upon which to predicate removability.

The holding of the court of appeals on this score is far from persuasive. It is a lyric leap to conclude that, because in these automobile cases the right to removal is "narrower than" the course and scope of employment, it is therefore "much narrower" than the immunity doctrine, since in none of these cases is the immunity doctrine involved. Further, as the petitioners point out in their brief, removal of a cause to a federal court under this holding would mean that the court would have no choice but to dismiss or grant summary judgment on the basis of immunity. The contrary seems in some cases to be the case. Thus in *Brann* v. *McBurnett,* 29 F.Supp. 188 (E.D. Ark.), it was held that two deputy United States Marshals who were transporting a federal prisoner to the penitentiary and had an accident on the way, were officers of the court engaged in the performance of their duties under 28 U.S.C. §1442 (a)(3) and hence could remove the case to the federal

court, although obviously there was no question of official immunity involved. It is difficult to conceive of a case involving official immunity where there would not also be the right of removal under the "color of office" test. The converse, however, is not true—unless perhaps in the rare situation where a defendant was able to put the plaintiff to his proof, even though defendant could not sustain his burden of proof under the removal statute.

The fundamental error of the court of appeals lies in its attempt to juxtapose these two concepts and to define the respective limits of each. The better approach would be to determine questions of removability and of official immunity separately—each on the merits of the individual case.

3. Respondent, however, is unwilling to concede that the holding of the court below runs counter to the plain meaning of the statute (Br. 9), or that it is at odds with the congressional intent in enacting and "successively expanding the scope of the removal statute." Or with the reference (Br. 16) to expansion of the *concept* of the removal statute. The most exhaustive research into the legislative history of §1442(a) and of its predecessor statutes affords no clue as to what meaning Congress attached to the term "color of office." Secondly, while Congress has successively extended the categories of persons who have the right of removal, it has not changed the underlying concepts involved. See *Oklahoma* v. *Willingham,* 143 F.Supp. 445 (E.D. Okla.); *Goldfarb* v. *Muller,* 181 F.Supp. 41 (D. N.J.).

4. Nor would the holding of the court of appeals appear seriously to undermine the immunity doctrine of *Barr* v. *Matteo, supra.* The defense of immunity is federal law, *Wheeldin* v. *Wheeler, supra; Howard* v. *Lyons,* 360 U.S.

593, 597. As such, it is as available in a state court (should the case not be removed or be irremovable) as in a federal court.

5. In any event, however, it is submitted that, despite possible error in its holding on the relative scope of the removal power and the immunity doctrine, the court of appeals did not err in remanding the case for a factual determination to establish whether federal jurisdiction could be supported under the removal statute.

II.

On the Basis of the Meager Record Before This Court and of the Nature of the Opinion of the Court of Appeals, It Would Be Appropriate for This Court, in the Present Posture of the Case, to Abstain From a Decision on the Relationship Between the Scope of the Immunity Doctrine and That of the Removal Power Respectively.

The present case comes before this Court on a record almost completely devoid of facts. The court of appeals noted that the only uncontroverted fact in the record was that all contacts between petitioners and respondent took place within the confines of the Leavenworth Penitentiary. The affidavits of petitioners in support of both their removal petition and their motions for summary judgment do not serve to enlighten the Court as to what connection, if any, the alleged acts had with petitioners' duties at the Penitentiary. The respondent appeared *pro se*. There was no hearing in the district court. There was no argument in the court of appeals, the case being submitted on the briefs (A. 66). Petitioners state that the first occasion they

had on which to deal with the removal question was on their petition for rehearing (A. 10, note 5). The opinion of the court of appeals is far from illuminating.

Upon occasion this Court has remanded cases in order that a more adequate record might be developed before full consideration of the merits by the Court. Cf. *Naim* v. *Naim*, 350 U.S. 891. That case, of course involved considerations peculiar to constitutional adjudication. Although the present case does not directly involve a constitutional issue, it does, however, raise questions in the delicate area of the relationship between the federal and state judiciaries, and it would seem more appropriate that such questions be resolved on the basis of a more adequate record than is presently before the Court.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed, at least insofar as it required a factual determination by the district court; or, in the alternative, the case should be remanded to the court of appeals, with directions to retain jurisdiction while such factual determination is being made by the district court.

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